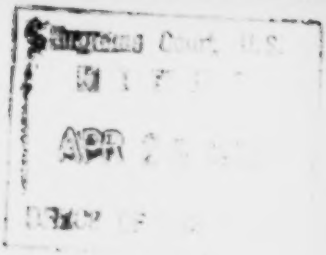
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No. 92-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

HOGUE INVESTMENT CORPORATION,
an Oregon Corporation
Petitioner,

V.

ROBERT ROGER FREDINBURG
Respondent.

Petition for a Writ of Certiorari To The Court of Appeals For the State of Oregon

---

PETITION FOR A WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

QUESTION PRESENTED

Whether an absolute one-year statutory redemption right, provided to the United States under 28 U.S.C. § 2410(c) as a condition of its consent to suit in state foreclosure actions, can be abrogated by state foreclosure law in direct confilict with congressional purpose.

A party to the proceedings below not listed in the caption is the Federal Deposit Insurance Corporation in its corporate capacity as successor to Bear Creek Valley Bank of Medford, Oregon. The FDIC joined as a respondent below, but declines to join in this petition. (See: *infra*, p. 11)

Marion C. Cooley was the plaintiff below in the state trial court, but did not participate in the proceedings at the Court of Appeals for Oregon, nor did the following defendants named in the trial court judgment: Marion C. Cooley as assignee of U.S. National Bank of Oregon, First Interstate Bank of Oregon, N.A., L. Ken Casteel, John C. Preston, Patricia J. Preston, Timotheas John Horn, Normalee D. Horn, Tischhauser, Cooper & Co., a partnership, and Frieda A. Kuttig.

Petitioner has no parent companies nor subsidiaries.

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No. 92-

HOGUE INVESTMENT CORPORATION,
an Oregon Corporation

Petitioner,

v.

ROBERT ROGER FREDINBURG,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF OREGON

Petitioner, Hogue Investment Corporation, requests that a writ of certiorari issue to review the decision and opinion entered by the Court of Appeals for Oregon on August 12, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for Oregon is reported at 114 Or App 532, 836 P2d 162 (1992), and is reprinted as Appendix A, *infra*. The February 13, 1991, order of the Circuit Court of Oregon is not reported, but is reproduced as Appendix B, *infra*. The judgment and decree of the Circuit Court of Oregon is not reported, but is reproduced as Appendix C, *infra*.

JURISDICTION

The decision and opinion of the Court of Appeals for Oregon was entered August 12, 1992 (App. A, *infra*). A timely petition for review in the Supreme Court for Oregon was denied on January 26, 1993 (App. D, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1257. The Supreme Court for Oregon has stayed issuance of a final appellate judgment vacating the redemption of real property by the United States, and the sale of that property to Petitioners, pending the ultimate outcome in this Court.

STATUTES INVOLVED

The constitutional provision involved is the Supremacy Clause which is found as Article VI §2 of the United States Constitution.

The statutory provisions involved are 28 U.S.C. § 2410(c) (1966) found as Appendix E, *infra*, and Oregon Revised Statute 23.530 (1989) found as Appendix F, *infra*.

STATEMENT

The Court of Appeals for Oregon struck down a federal right of redemption granted to the United States by Congress in 1931. The court below reversed an Oregon trial court order which had confirmed that the Federal Deposit Insurance Corporation owned a one-year right to redeem certain real property from a foreclosure sale pursuant to both federal law and the terms of the foreclosure decree itself. The Oregon trial court relied on and cited 28 U.S.C. § 2410(c) as controlling (See: App. B, *infra*, at 10a). This trial court order is considered final for purposes of appeal under Oregon procedural law.

In accordance with and in reliance on the trial court order, the Federal Deposit Insurance Corporation redeemed the property in strict compliance with all state procedural requirements, and then sold its redemptioner's interest to Petitioner. Subsequently, the debtor filed a state court appeal claiming that state law superseded 28 U.S.C. § 2410(c).

The Court of Appeals for Oregon discussed the federal questions presented under Article VI §2 of the United States Constitution, and acknowledged that federal preemption based on the Supremacy Clause would apply, were it not for the existence of a particular state statute, O.R.S. 23.530 (App. F, *infra*, 21a). The decision below resolved the federal constitutional question adversely to the United States and to Petitioner, ruling that the Federal Deposit Insurance Corporation had failed to meet the state law definition of "who may redeem" (See: App. A, *infra*, at 4a), this despite both the plain language of 28 U.S.C. § 2410(c) (App. A, *infra*, at 19a) defining the United States as a redemptioner, and despite the plain language found in *United States v. John*

Hancock Mut. L. Ins. Co., 364 U.S. 301 holding that exceptions to the federal right to redeem are not to be implied.

A petition for review was timely filed asking the Supreme Court for Oregon to review the propriety of the decision below. This petition specifically raised, once again, the federal constitutional question. The Supreme Court for Oregon denied the petition, declining to review the decision below.

The majority below determined that the United States was required by state law to seek affirmative relief consisting of foreclosure by crossclaim and reduction to judgment of its own junior lien as a condition to having a later right of redemption if the outcome of the foreclosure was a judicial sale. The court below did not address what would happen if the debt underlying the junior lien of the United States was not yet due, and, thus, not ripe for foreclosure[1].

The dissent below pointed out that Congress has spoken by making optional the foreclosure by the United States of its own lien, as one of two specifically stated separate remedies (the other being the one-year redemption right), and that the reading of a state statute to make mandatory what is optional under federal law would run against congressional intent[2].

---

[1] Under the decision below the only conceivable outcome would be that the United States would not only lose its lien, but also all other rights in the property by operation of state law, and be completely helpless to prevent that result. (See: *infra*, p.11).

[2] Judge Edmunds, dissenting, wrote in part: "In summary, the right of redemption in section 2410(c) is a right that cannot be impaired by state law, because Congress intended that the federal government not lose the value of the security for a debt owed to it through a state court foreclosure proceeding. The majority qualifies FDIC's right to redemption under ORS 23.530 (2). It makes the right dependent on whether FDIC reduces its lien to judgment in the foreclosure proceeding. It reads a requirement into the statute that is not there: *i.e.*, that, in order to enforce a right of redemption, the redemptioner must have foreclosed its lien. That construction is inconsistent with the law of federal preemption, because it impairs attainment of the goal of Congress when it enacted section 2410(c). The majority errs when it fails to carry out Congress' intent." (App. A, *infra* at 9a).

REASONS FOR GRANTING THE PETITION

I. THE STATE COURT HAS DECIDED AN IMPORTANT FEDERAL QUESTION CONCERNING THE ACCOMMODATION OF BOTH STATE AND FEDERAL INTERESTS UNDER THE UNITED STATES CONSTITUTION IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT AND OF SEVERAL OF THE FEDERAL CIRCUITS.

A. *The State Court Decision Strikes Down a Federal Right in Conflict with this Court's Decision in United States v. John Hancock Mut. L. Ins. Co., 364 U.S. 301.*

1. *Federal Preemption.* Federal law preempts state law in this case for the same reason it did in *John Hancock*, supra. In *John Hancock,* both Congress and Kansas had legislated concerning the time in which the United States could redeem; in the present case, both Congress and Oregon have legislated concerning whether or not the United States must crossclaim to foreclose its own junior lien as a condition to owning a right to redeem. Congress has granted the United States the option of deciding whether or not it is economically feasible to affirmatively sue for its own foreclosure, but in any event has given the United States a one year redemption right (App. E, *infra*). Oregon would require an affirmative foreclosure suit by the United States as a condition to obtaining the right to redeem. State law must yield under the Supremacy Clause, at least to the extent that the state statute actually conflicts with federal law. See: *Hillsborough County v. Automated Med. Labs.*, 471 U.S. 707. Such actual conflicts arise not only where state law is contrary to federal law on its face, but also where state law inhibits or prevents the accomplishment of a recognizable congressional purpose. See: *Hines v. Davidowitz,* 312 U.S. 52, 67; see also: *Fidelity Federal S. & L. Assn. v. de la Cuesta,* 458 U.S. 141, 153. Both varieties of actual conflict exist in the present case.

2. *The Conflict Between Federal and State Law.* Federal law grants the United States as a junior lienholder two remedies in foreclosure: The first is the option of whether or not to incur the expense of seeking affirmative relief by way of foreclosure of its own lien by crossclaim, and the second is an

unconditional one year right to redeem if a foreclosure sale is actually held (App. E, *infra* at 19a). These two federal rights are mutually exclusive and not dependent or conditional upon one another. 28 U.S.C. § 2410(c) states in relevant parts:

> "Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem, ***
>
> "In any case where the debt owing the United States is due, the United States may ask, by way of affirmative relief, for the foreclosure of its own lien and where property is sold to satisfy a first lien held by the United States, the United States may bid at the sale ***"

The Oregon Statute used by the Court of Appeals for Oregon to strike the federal right to redeem in this case defines those who have a right to redeem under Oregon law, stating in relevant parts:

> "23.530 Who may redeem. Property sold subject to redemption * * * may be redeemed by the following persons:
> "*****
> "(2) A creditor having a lien by judgment, decree or mortgage on any portion of the property * * * subquent in time to that on which the property was sold. Such creditors, after having redeemed the property, are to be termed redemptioners." (App. F, *infra*, 21a).

The majority below held that the United States, having failed to crossclaim for judicial foreclosure of its own mortgage, thereby failed to bring itself under the state law definition of "redemptioner". The Oregon court reasoned that at the time of the foreclosure sale the United States did not have a lien "by judgment, decree, or mortgage" because the United States had not foreclosed and reduced its own mortgage to a judgment lien, and because its mortgage lien had been specifically dis-

charged in the foreclosure of the senior lien[3].

Thus, the Court of Appeals for Oregon held that after the decree was entered the United States could never have been and never was a redemptioner because it did not fit the Oregon statutory definition of "who may redeem", this despite the plain language of 28 U.S.C. § 2410(c) to the contrary (App. E, *infra* at 19a).

The actual conflict between federal and state law is that Oregon law, on its face, requires the United States to seek affirmative relief to reduce its own mortgage to a judgment lien or forever lose its right of redemption. Federal law, on its face, grants the United States the power to exercise the option of seeking such affirmative relief if that is perceived to be in its best interests, and, additionally, federal law further unconditionally grants the United States a one year right to redeem after the judicial sale of a senior interest, this without regard for whether or not the United States does decides to foreclose its own mortgage. This actual conflict between federal and state law is more than one of merely words alone. The conflicting state law actually and observably stymies an important stated congressional purpose.

3. *The Congressional Purpose of 28 U.S.C. § 2410(c).* This Court has previously analyzed the legislative history of 28 U.S.C. § 2410(c) in *John Hancock*, supra, at 305-306, finding that Congress expressly stated that one of its primary purposes in crafting subheading c of this legislation was that of protecting the interests of the United States as a junior lienholder. This Court recognized and approved the right of Congress to create federal powers as conditions to its waiver of sovereign immunity, and quoted *Soriano v. United States*, 352 U.S. 270, 276, for the proposition that these protective conditions "must be strictly observed and exceptions thereto are not to be implied." *John Hancock*, supra, at 305-306.

There were and are three basic means by which the interests of a junior lienholder can be protected in a foreclosure. The three, all of which are addressed in 28 U.S.C.

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[3] The court below did not explain why the redemption right of the United States which was specifically preserved in the foreclosure decree did not constitute a "lien by decree" (See: App. C, *infra* at 14a).

§ 2410(c), are 1) foreclosure of the junior lien by cross complaint, 2) the exercise of a right of redemption, and 3) a bid at the foreclosure sale. The intentions of Congress concerning the first two of these are important to this case:

3a. *Foreclosure of the Junior Lien by Cross Complaint.* An early draft of what became 28 U.S.C. § 2410(c) would have granted the senior foreclosing lienholder the option of removing the proceeding temporarily to the Federal District Court, this for the limited purpose of seeking determination of both the priority and the amount of the junior lien of the United States (See: H Rep No 2029 on H R 13981, 70th Cong, 2d Sess, Jan. 8, 1929). However, the later conference committee version of the bill which actually became federal law granted the United States, instead of the foreclosing party, the option of seeking a determination of the junior lien owned by the United States in either the state or federal court. (See: Pub. Laws, Chap. 515, 71st Cong, Sess III, March 4, 1931). Thus, Congress specifically and intentionally granted the United States the power to decide whether or not to seek its own affirmative relief, and in which court to seek it if the election to foreclose is made.

3b. *The Exercise of a Right of Redemption.* A primary concern of Congress prior to the enactment of 28 U.S.C. § 2410(c) was that the United States might not have sufficient time to obtain the appropriation of funds necessary to exercise a right to bid at a foreclosure sale. At one point, in order to provide more time for the United States to protect its interest, it was proposed that a foreclosure sale involving the United States as a junior lienholder could be stayed by the Attorney General until the expiration of the next succeeding term of Congress (See: S Rep No 351, 71st Cong, 2d Sess, 1-2, April 7, 1930). Instead, the bill later actually enacted into law limited the right of the United States to bid at foreclosure sales to those occasions where the United States is in a first lien position, but, importantly, then went on to substitute a substantial federal right not found in the earlier legislative drafts; this was the one year right to redeem (See: Pub Laws, Chap. 515, 71st Cong, Sess III, March 4, 1931). No conditions were attached to this federal right. (App. E, *infra*, at 19a).

B. *The State Court Decision is in Conflict With Other Decisions By This Court and By Several of the Federal Circuits.*

Virtually all, if not all, of the federal appellate courts which have previously considered 28 U.S.C. § 2410(c) in terms of federal preemption principles have concluded that the specific federal rights granted to the United States as conditions to the waiver of sovereign immunity must be narrowly construed, and that exceptions to those conditions should not be implied. (See: *John Hancock*, supra, at 306; see also: *Schmidt v. King*, 913 F. 2d 837 (10th Cir. 1990). The touchstone of federal preemption analysis is universally recognized as being that of determining congressional intent. When the intent of Congress to fully supplant state law in a particular area is not specifically stated, preemption is still inferred if state law presents a conflict with or interferes with an express purpose or plan of Congress. *Pennsylvania v. Nelson*, 350 U.S. 497.

In *United States v. Brosnan*, 363 U.S. 237, this Court held that Congress, in enacting 28 U.S.C. § 2410, neither expressly nor impliedly intended to completely exclude state procedural law in foreclosures involving the United States, except for those issues specifically addressed by Congress. This Court reasoned that § 2410 was silent as to divestiture of federal tax liens, and therefore, since Congress had not spoken to this topic, there was no federal preemption and state law was allowed to prevail[4]. The rationale of both *Brosnan* and *John Hancock*, supra, are consistent with one another to the extent that each permits state law to control, except as to any topic specifically addressed by Congress. In *John Hancock*, Kansas was not permitted to require a different time for the United States to redeem because Congress had established that time; in *Brosnan*, California was permitted to regulate tax lien divestiture because Congress had not spoken to that topic. The Oregon decision below conflicts with each of these two decisions of this Court because Congress has spoken to whether or not the United States is required to foreclose its

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[4] In 1966, Congress amended 28 U.S.C. § 2410(c) to specifically address liens arising under the internal revenue laws. Presumably the result in *Brosnan* would be different today. Pub. L. 101-647, Title XXXVI, § 3630, 104 Stat. 4966, Nov. 29, 1990.

own lien as a condition to having a right to redeem, imposing no such condition.

The Oregon decision below also conflicts with each of several decisions from among the various circuits. In *Dupnik v. United States*, 848 F. 2d 1476 (9th Cir. 1988), the Ninth Circuit decided that federal preemption would not prohibit applying an Arizona notice requirement to the United States because Congress had not spoken to the issue of notice in redemption cases, and, therefore, that portion of the field was not federally occupied. 848 F. 2d at 1479.

In *Title Ins. Co. of Minnesota v. I.R.S. of U.S.*, 963 F. 2d 297 (10th Circ. 1992) the Tenth Circuit, while rejecting the analysis of the Ninth Circuit in *Dupnik*, supra, noted that even though 28 U.S.C. § 7425(d), the I.R.S. counterpart to 28 U.S.C. § 2410(c), is silent as to notice, the Tenth Circuit still held that a Colorado 75-day notice provision was preempted by a federal regulation found at C.F.R. 301.7425-4(b)(4)(ii). The federal regulation provided for a 120-day notice[5]. Once again, the analysis turned in favor of federal preemption where federal law or federal regulations had spoken to the particular topic in issue.

The case of *United States v. Warford*, 791 F. 2d 1519 (11th Cir. 1986), is in accord with the foregoing. *Warford* is a case factually similar to the present one, with the notable exception that the Florida foreclosure decree to which the United States had stipulated also specifically foreclosed the right of the United States to redeem. The United States was, therefore, held bound by the terms of the Florida decree in which it had acquiesced, and was held not to be assisted by federal preemption. In the present case, to the contrary, the Oregon judgment and decree specifically preserved the Federal one-year right to redeem, specifically mentioning 28 U.S.C. § 2410(c) as the basis. (See: App. C, *infra*, at 14a).

In *United States v. Sizemore*, 747 F. 2d 470 (8th Cir. 1984),

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[5] The Tenth Circuit then decided the case on the basis that the preemptive notice provision found in the federal regulation had not be complied with by the I.R.S.

the Eighth Circuit held that the United States retained its right to redeem under federal law where the Arkansas amended consent decree had specifically reserved that right to the United States. The *Sizemore* court ruled that federal law would not have been permitted to preempt the provisions of the Arkansas decree to which the United States was signatory, however, the right of redemption of the United States was sustained on the basis that an amended decree, appropriate under state law, had been entered, removing language which would have foreclosed the redemption right itself. The Arkansas amended decree, similar to *Warford*, supra, and similar to the present case, specifically reserved and stated the federal right to redeem. In *Sizemore* as in *Warford*, both the state court decree and the federal right to redeem were given effect. The language used in the *Sizemore* amended decree preserving the redemption right of the United States is nearly identical to the language used by the Oregon judgment and decree in the present case[6].

The Oregon decision below is in conflict with the Eighth, Ninth, Tenth and Eleventh Circuits.

II. THE ISSUE RAISED IN THIS CASE IS OF SUBSTANTIAL IMPORTANCE BEYOND THE INTERESTS OF THE PARTICULAR PARTIES INVOLVED.

The state of Oregon presently finds itself with a failing timber-based economy, with few, if any, short-run solutions to the problems thereby presented. It is a simple fact that judicial foreclosures will continue to rise in number as timber companies continue to fail and sawmills continue to close.

Numerous federal agencies will continue to have rights of redemption to protect, sometimes for use in settlement negotiations, sometimes for actual exercise, and sometimes, as in this case, for sale to someone in the private sector. It would

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[6] The *Sizemore*, supra, decree stated: "...except that the United States of America retains its right of redemption set forth in 28 U.S.C. § 2410." 747 F. 2d at 471.

The Oregon decree herein stated: "...excepting only [the United States'] 365-day statutory right of redemption pursuant to 28 U.S.C., Section 2410(c)." (App. C, *infra*, at 14a).

be a difficult task to catalog the names or even the initials of all the federal agencies effected by a disenfranchisement of federal redemption, or the additional burden which will be placed on the United States by the Oregon decision below. The FDIC is only one of dozens of federal agencies regularly finding themselves in a position of protecting a junior lien.

The FDIC joined in the appeal below, but has now declined to refer this case to the Solicitor General. This decision was apparently based primarily on the fact that the FDIC has enacted an internal policy change whereby it will no longer exercise rights of redemption after July 2, 1992. See: *Federal Register*, Vol. 57, No. 128, 29493, July 2, 1992. The FDIC apparently concludes that the issue presented is not of enough future importance to that particular agency to motivate a referral to the Solicitor General. The importance still exists, however, as to all of the other federal agencies which have not adopted a similar policy change, and to all private citizens and entities who, like Petitioner, have dealt with the United States by purchasing a redeemed interest in good faith.

Additional importance can be gleaned from the fact that the decision below actually extinguishes the federal right to redeem in some cases, leaving no way for any agency of the United States to acquire what Congress granted. For example, if the debt underlying the junior lien of the United States is not yet due, and a senior lienholder whose debt is due forecloses, then the United States loses its entire interest and is powerless to prevent this happening. The United States cannot foreclose a lien where the debt is not due, cannot bid at the foreclosure sale unless it is in first position under § 2410(c), and will lose its right to redeem under the decision below for its failure to foreclose which it is helpless to do. In future cases presented to the Oregon courts and to the courts of states adopting this Oregon position, state law will completely eliminate, without any recourse, all of the powers specifically granted to the United States by Congress.

Another important result of the decision below is that hereafter every foreclosure in Oregon, and in every state following this Oregon precedent, the United States, if the debt owing to it is due, must file its own crossclaim for foreclosure

whether or not there is any equity in the property over and above the value of the senior lien being foreclosed. This will be necessary, in all cases at great expense, in order to protect, in advance, the interests of the United States from the situation where foreclosed property sells at foreclosure sale for substantially less than its fair market value. It is the existence of the redemption right of each lienholder that inhibits the bidders at a foreclosure sale from grossly underbidding the property and thus escaping with equity properly belonging to those in a junior position. The United States is prohibited from protecting its interests by bidding at the sale unless it is in first position, thus, in all cases where the United States is a junior lienholder, the United States Attorney will have to expend resources foreclosing all liens, whether economically justifiable or not, this only to preserve the right to redeem which Congress had unconditionally granted in the first place.

Finally, this case represents a patently incorrect application of federal preemption doctrine by a state court in an area of enough concern to have reached this Court on two prior occasions and the various circuits on numerous occasions. The decision below is in conflict with binding federal precedent, erodes federal preemption law and defeats a valuable federal right. The supervision of this court is needed.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

April 1993

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF OREGON

MARION C. COOLEY
Plaintiff,
v.
ROBERT ROGER FREDINBURG
Appellant,

MARION C. COOLEY, AS ASSIGNEE OF U.S. NATIONAL BANK OF OREGON; FIRST INTERSTATE BANK OF OREGON, N.A.; L. KEN CASTEEL; JOHN C. PRESTON; PATRICIA J. PRESTON; TIMOTHEAS JOHN HORN; NORMALEE D. HORN; TISCHHAUSER, COOPER & CO. AND FRIEDA A. KUTTIG
Defendants,
and
FEDERAL DEPOSIT INSURANCE CORPORATION AND HOGUE INVESTMENT CORPORATION,
Respondents.

(88-0971-J-1; CA A68733)

In Banc

Appeal from Circuit Court, Jackson County.

L.A. Merryman, Judge

Argued and submitted December 13, 1991; resubmitted in banc May 6, 1992.

Douglas J. Richmond, Medford, argued the cause and filed the briefs for appellant.

David V. Gilstrap, Ashland, argued the cause for respondent Hogue Investment Corporation. With him on the brief was Ainsworth, Davis, Gilstrap, Harris, Balocca & Fitch, P.C., Ashland.

Frank C. Higham, San Jose, California, waived appearance for respondent Federal Deposit Insurance Corporation.

BUTTLER, J.
Reversed.
Edmonds, J., dissenting

BUTTLER, J.

Fredinburg (defendant) appeals an order that determined that Federal Deposit Insurance Coroporation (FDIC) had the right to redeem his real property after he had redeemed it from the purchaser at a sheriff's sale. We reverse.

FDIC was joined in a mortgage foreclosure commenced by plaintiff against defendant, the debtor, and numerous other mortgage or deed of trust lien claimants. A stipulated[1] judgment was entered in the foreclosure awarding plaintiff judgments against defendant for various amounts on various claims, including a trust deed and a subsequent mortgage. With respect to the trust deed and mortgage, the judgment declares that the trust deed is a "first, valid, prior and subsisting lien" against the described real property, and that the mortgage "is a valid and subsisting lien * * * [against the described property] and that lien is superior to any interest, lien or claim [other than the trust deed]." The judgement then provides for the sale of the property and for disposition of the proceeds. FDIC did not assert its lien claim in the foreclosure proceeding and did not obtain a judgment against defendant for the amount of the outstanding debt. The judgment provides that FDIC is forever foreclosed of all interest, lien or claim in the described real property, "excepting only its 365-day statutory right of redemption pursuant to 28 U.S.C., Section 2410(c)."

The property was sold to a third party at a sheriff's sale on June 14, 1990. Defendant then redeemed. On February 6, 1991, FDIC gave notice of its intent to redeem the property under 28 USC § 2410(c). After defendant objected, the sheriff declined to act, whereupon FDIC moved for an order "Establishing FDIC Right to Redemption," which the court granted. Defendant appeals from that order.

Hogue Investment Corporation (Hogue), as successor to FDIC, makes several arguments on appeal challenging appellate jurisdiction, only one of which requires discussion. It

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[1]The stipulation was between plaintiff and FDIC only. Default orders had been entered against all defendants except FDIC and Cooley, as assignee of U.S. National Bank of Oregon

argues that the trial court's order determining that FDIC had the right to redeem from defendant is not a final order, because the sheriff was not a party and the order did not direct the sheriff to permit FDIC to redeem. Therefore, it argues, it is not an order affecting a substantial right, ORS 19.010(2)(c), and is not appealable. However, FDIC invoked the jurisdiction of the court for an order in aid of execution to determine that it had the right to redeem from defendant, notwithstanding that defendant is the debtor and claimed that no right of redemption existed after he had redeemed. ORS 23.600. The sheriff appeared by county counsel. It is clear that the sheriff would not have permitted FDIC to redeem in the absence of the court's ruling. Therefore, the order affected a substantial right of both parties and is appealable under ORS 19.010(2)(c).

On the merits, defendant argued below, and argues here, that when he, as the debtor, redeemed the property, the effect of the foreclosure sale was terminated; therefore, there was no sale that would give rise to a right of redemption under Oregon law. He is correct. ORS 23.600 provides in part:

> "If the judgment debtor redeems at any time before the time for redemption expires, the effect of the sale shall terminate and the judgment debtor shall be restored to the estate of the judgment debtor."

If that is all that there were to the case, FDIC[2] would prevail, because federal law would preempt Oregon law to the extent that it does not provide a procedure for FDIC to protect its interest. 28 USC § 2410(c) provides, in part:

> "A judgment or decree in such action or suit shall have the same effect respecting the discharge of the property from the mortgage or other lien held by the United States as may be provided with respect to such matters by the local law of the place where the court is situated. * * *

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[2] ORS 19.010(2) provides, in part:

"For the purpose of being reviewed on appeal the following shall be deemed a judgement or decree:

"* * * * *

"(c) A final order affecting a substantial right, and made in a proceeding after judgment or decree."

> *Where a sale of real estate is made to satisfy a lien prior to that of the United States,*[3] *the United States shall have one year from the date of the sale within which to redeem* * * *. In any case where the debt owing the United States is due, *the United States may ask, by way of affirmative relief, for the foreclosure of its own lien and where property is sold to satisfy a first lien held by the United States, the United States may bid at the sale* * * *." (Emphasis supplied.)

However, defendant argues that FDIC simply neglected to protect its rights when it failed to assert its lien and obtain a judgment in the foreclosure proceeding. He points out that, if it had obtained a judgment in the foreclosure, instead of permitting its interest in the property to be foreclosed, it would have had a judgment lien that would have been revived when he, the debtor, redeemed the property. It could then have executed on that judgment without having to pay the price of redemption. He is also correct in that argument. *Franklin v. Spencer,* 309 Or 476, 488, 789 P2d 643 (1990). Not only would FDIC not have been required to put up any money, it would have had a lien that would remain for 10 years and would be renewable. ORS 18.360

It is also true that, under Oregon law, the failure of FDIC to assert and establish its lien and to obtain a judgment for the amount thereof, precludes it from redeeming the property from *anyone,* because it no longer has a "lien by judgment, decree or mortgage" on the property. ORS 23.530(2).[4] It did not assert its lien claim in the foreclosure proceeding and did not obtain a judgment on its claim, and, by the judgment, it was "forever

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[3] Defendant does not contend that FDIC is not the United States within the meaning of § 2410.

[4] ORS 23.530(2) provides:

"Property sold subject to redemption, as provided in ORS 23.520, or any part thereof separately sold, may be redeemed by the following persons:

"* * * * *

"(2) A creditor having a lien by judgment, decree or mortgage on any portion of the property, or any portion of any part thereof separately sold, subsequent in time to that on which the property was sold. Such creditors, after having redeemed the property, are to be termed redemptioners."

foreclosed of all interest, lien or claim in the real property." If FDIC had obtained a judgment in the foreclosure proceeding, it would have taken the steps necessary to permit it to exercise its right to redeem from anyone other than the debtor within 1 year from the date of sale. 28 USC § 2410(c). However, as defendant points out, if FDIC had done that, it would also have been in the more advantageous position of being able to execute on its judgment when he redeemed.

The problem here is that FDIC did nothing, even though under Oregon law it could have taken the steps necessary to permit it to exercise its right to redeem or to collect on its judgment lien. Although 28 USC § 2410(c) requires Oregon to permit redemption by the government within 1 year from the date of sale, nothing entitles the government, or anybody else, to redeem when it has failed to follow the state procedures that would have permitted it to protect itself. That federal statute specifically provides:

> "In any case where the debt owing the United States is due, the United States may ask, by way of affirmative relief, for the foreclosure of its own lien and where property is sold to satisfy a first lien held by the United States, the United States may bid at the sale * * *."

It is apparent that Congress recognized that it would or might be necessary for the government to foreclose its lien in order to be in a position to redeem or to otherwise protect its interest.

In *U.S. v. John Hancock Mut. Ins. Co.*, 364 US 301, 81 S Ct 1, 5 L Ed 2d 1 (1960), on which Hogue and the dissent rely, the court expressly pointed out that the government had "satisfied the procedural requirements" (364 US at 304) of the state's laws: It had sought and obtained affirmative relief on its lien claim, obtained a judgment against the debtor in the foreclosure and had followed the proper procedure to redeem. The problem was that, under Kansas law, the debtor had the sole right to redeem within the first 12 months after the sale, and that was the 12 months during which the federal statute gave the federal government the right to redeem. The state law effectively took away the

government's right to redeem, and there is nothing in the opinion suggesting that, under Kansas law, the government had any other recourse to collect its judgment by the sale of the debtor's property. The court held that the federal statute controlled and that the state must permit the government to redeem within 12 months after the foreclosure sale.

In reaching that conclusion, the court pointed out that Congress was concerned about a situation in which the United States, as a junior lienor, would find its lien dissolved without having had a chance to protect its right to any amount that the foreclosed property might be worth in excess of the senior lien. 364 US at 305. It recognized that one method of protecting that right would be to permit the government to bid at the sale. However, it also recognized that, in order to bid, it was necessary to obtain an appropriation from Congress, which might take more time than was available before the sale. Therefore, Congress provided that, not only may the government bid at the sale, it would also have 1 year within which to redeem in order to give it time to secure an appropriation and protect its interest. 364 US at 306.

Here, if FDIC had satisfied the requirement of Oregon law, its judgment lien would have been revived when defendant redeemed; it would not have been required to obtain an appropriation and it would have had more than 1 year within which to execute on its judgment. Thus, Oregon law more than satisfies the concerns of Congress in enacting § 2410(c).

Furthermore, in *John Hancock,* the government was owed several amounts represented by separate notes. It claimed in the foreclosure that the mortgage should secure all of them. The Kansas court held that only one of them was secured under Kansas law. The United States Supreme Court, after holding that the government had the right to redeem, recognized that, if the mortgagors wished to redeem in turn from the United States, "[t]he question whether the United States is entitled to payment of its claims in full upon redemption by the mortgagors or only to such debts as have been declared liens by the state courts is one to be decided according to Kansas law." 364 US at 309. It is clear that § 2410 does not preempt all of the state's laws.

FDIC failed to take the steps that the federal statute recognizes that it would, or might, be required to take in order to protect itself. It has no right to complain.

Reversed.

EDMONDS J., dissenting

The majority holds that the provisions of 28 USC § 2410(c) do not preempt the requirement in ORS 23.530(2) that FDIC must have asserted its lien and obtained a judgment in the foreclosure proceeding in order to effect a redemption as a creditor. The question of federal preemption is one of Congressional intent. *Best v. U.S. Nat. Bank*, 303 Or 557, 739 P2d 554 (1987). Federal preemption applies when federal law expressly precludes state action or, if the federal law on its face is unclear or silent, when the state law directly conflicts with the federal law, interferes with the operation or impairs attainment of federal goals or when Congress has "occupied the field." *Derenco v. Benj. Franklin Fed. Sav. and Loan,* 281 Or 533, 540-41, 577 P2d 477, *cert den* 439 US 1051 (1978).

28 USC § 2410(c) provides, in part, that "[w]here a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of the sale within which to redeem." The next sentence in the statute provides that the "United States may ask, by way of affirmative relief, for the foreclosure of its own lien * * *." Thus, the statute contemplates two separate rights of federal agencies that cannot be preempted by state law; the right to appear as a party, foreclose its lien in a state proceeding and purchase the property at the sale, *and* the right to redeem, even if it has not foreclosed its lien. That construction is supported by the legislative history that the one year redemption right was enacted in addition to an existing provision providing that the United States could be a party to a foreclosure proceeding in the state court. Initially, the bill proposed that the government be authorized only to bid at the foreclosure sale when the property was sold to satisfy a senior lien. Congress was concerned that there would not be appropriated funds available for the agency to make the purchase. Underlying that concern was the need to protect the value of the

government's security that would otherwise be lost through the foreclosure of a senior lien. Those provisions were rejected in part and replaced when congress adopted the provisions of section 2410(c) that provide for an absolute right of redemption for a twelve-month period. See 72 Cong Rec 1998-1999 (1930); 72 Cong Rec 3117-3120 (1930); 72 Cong Rec 7020 (1930); S Conf Rep, 71st Cong, 3d Sess (1930); 74 Cong Rec 5466-5467 (1930); 74 Cong Rec 5865-5866 (1930).

Congressional intent is illustrated by *United States v. John Hancock Mut. L. Ins. Co.*, 364 US 301, 81 S Ct 1, 5 L Ed 2d 1 (1960). There, the state law took away the government's right to redeem by giving the debtor the exclusive right to redeem within twelve months after the sale and thereby cut off all redemption rights of lien creditors. The purchaser of the property at the foreclosure sale argued that the Farmers Home Administration could have protected its lien by out-bidding the purchaser at the sale pursuant to its authority under another federal statute. To accept that argument would have required the Court to read into section 2410(c) a limitation of the preemptive right of redemption that would authorize "redemption 'except where another federal statute authorizes the particular agency concerned to bid at foreclosure sales.' " 364 US at 307. The Court rejected the argument.

The purchaser also argued that the United States, by seeking affirmative relief in a state court, had subjected itself "to all the incidents of state law which govern other suitors." 364 US at 308. In response, the Court noted that the United States is not subject to local statutes of limitations and that the proceedings were not initiated by the United States. The purchaser contended that, because the first sentence of section 2410(c) provided at that time that "[a] judicial sale in such action or suit shall have the same effect respecting the discharge of the property from liens * * * held by the United States as may be provided * * * by the local law of the place where the property is situated," the right to redeem was qualified by state law. Again, the Court rejected that interpretation, noting that it would render the right of redemption in section 2410(c) "nugatory." 364 US at 308.

In summary, the right of redemption in section 2410(c) is a right that cannot be impaired by state law, because Congress intended that the federal government not lose the value of the security for a debt owed to it through a state court foreclosure proceeding. The majority qualifies FDIC's right of redemption under ORS 23.530(2). It makes the right dependent on whether FDIC reduced its lien to judgment in the foreclosure proceeding. It reads a requirement into the statute that is not there; *i.e.*, that, in order to enforce a right of redemption, the redemptioner must have foreclosed its lien. That construction is inconsistent with the law of federal preemption, because it impairs attainment of the goal of Congress when it enacted section 2410(c). The majority errs when it fails to carry out Congress' intent.

I dissent.

APPENDIX B

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR JACKSON COUNTY

MARION C. COOLEY, *Plaintiff,* vs. ROBERT ROGER FREDINBURG, *et al.*, *Defendants.*	CASE NO. 88-0971-J-1 ORDER ON FDIC MOTION ESTABLISHING FDIC RIGHT TO REDEMPTION

THIS MATTER came regularly before the Court for hearing upon the motion of Defendant Federal Deposit Insurance Corporation for a supplemental order in aid of execution declaring that party's right to redeem the subject real property from the judgment debtor who has previously redeemed; Plaintiff waived appearance, Federal Deposit Insurance Corporation appeared pro per, the Sheriff of Jackson County, Oregon, appeared by County Counsel, Arminda Brown, and defaulted defendant Robert Roger Fredinburg appeared by Attorney Bruce Kellington; the Court, having examined the file, heard arguments of counsel, and being now fully advised;

IT IS HEREBY ORDERED that the motion of Federal Deposit Insurance Corporation be and the same hereby is GRANTED.

IT IS FURTHER ORDERED that the Federal Deposit Insurance Corporation has the right to redeem the subject property within one year of the date of sheriff's sale which was June 14, 1990, this is accordance with the decree of foreclosure and 28 USC § 2410.

DATED: February 13, 1991

/S/ L.A. MERRYMAN
Circuit Court Judge

APPENDIX C

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR JACKSON COUNTY

MARION C. COOLEY,
Plaintiff,

vs.

ROBERT ROGER FREDINBURG; MARION C. COOLEY, AS ASSIGNEE OF U.S. NATIONAL BANK OF OREGON, A STATE BANKING ASSOCIATION; FEDERAL DEPOSIT INSURANCE CORPORATION, IN ITS CORPORATE CAPACITY, AS SUCCESSOR TO BEAR CREEK VALLEY BANK; FIRST INTERSTATE BANK OF OREGON, A STATE BANKING ASSOCIATION; L. KEN CASTEEL; JOHN C. PRESTON AND PATRICIA J. PRESTON, HUSBAND AND WIFE; TIMOTHEAS JOHN HORN AND NORMALEE D. HORN, HUSBAND AND WIFE; TISCHHAUSER, COOPER & CO., A PARTNERSHIP; AND FRIEDA A. KUTTIG.
Defendants.

NO. 88-0971-J-1

STIPULATED JUDGMENT AND DECREE OF FORECLOSURE AND MONEY JUDGMENT

This matter coming before the Court upon the stipulation of plaintiff, by and through her attorney, Penny L. Austin, and defendant, FDIC, by and through its attorney, Michelle L. Kerr, on the complaint for foreclosure, and this matter further coming before the Court upon the stipulation of defendant, Marian C. Cooley as assignee of U.S. National Bank of Oregon, by and through her attorney, Penny L. Austin, and defendant, FDIC, by and through its attorney, Michelle L. Kerr, on the cross-claim filed herein by defendant, U.S. National Bank of Oregon, which subsequently assigned all of its interest to Marian C. Cooley, and Marian C. Cooley was substituted as defendant in place of U.S. National Bank of Oregon; AND

It appears from the records and files herein that, with respect to plaintiff's action, orders of default were entered against defendants, Timotheas John Horn, Normalee D. Horn, Frieda A. Kuttug, John Preston, Robert Fredinburg, Patricia

Preston, L. Ken Casteel, Tischhauser, Cooper & Co., First International Bank; AND

It appears from the records and files herein that, with respect to defendant's, Marian C. Cooley as assignee of U.S. National Bank of Oregon, action, orders of default were entered against defendants, Timotheas John Horn, Normalee D. Horn, Patricia J. Preston, John C. Preston, Tischhauser, Cooper & Co., Robert Roger Fredinburg, L. Ken Casteel, Frieda A. Kuttig, and First Interstate Bank of Oregon; AND

The Court being fully informed of all relevant facts, and it appearing that plaintiff is entitled to the relief sought, and that defendant, Marian C. Cooley as assignee of U.S. National Bank of Oregon is entitled to the relief sought; now, therefore, it is hereby

ORDERED, ADJUDGED AND DECREED:

1. Plaintiff is awarded judgment against defendant, Robert Roger Fredinburg, in the amount of $41,422.80, plus pre- and post-judgment interest thereon at the rate of 9.75% per annum from February 2, 1988, until paid; $173 as reasonable expenses; $3,000 as plaintiff's attorney's fees; and for costs incurred herein, and that writ of execution shall issue therefor.

2. The trust deed executed and delivered by defendant, Robert Roger Fredinburg, to plaintiff dated July 13, 1978, and recorded July 17, 1978, as document no. 78-15861 in the official records of Jackson County, Oregon, is a first, valid, prior and subsisting lien for the account of plaintiff's judgment set forth in paragraph 1 above against all of the real property situated in Jackson County, Oregon, described as:

See Exhibit "A" attached hereto

and that plaintiff's lien is superior to any interest, lien or claim of defendants, or any of them, in the property.

3. Defendant, Marian C. Cooley, as assignee of U.S. National Bank of Oregon is awarded judgment against defendant, Robert Roger Fredinburg, in the sum of $8,012.39, plus pre- and post-judgment interest thereon at the rate of 12% per annum from June 15, 1987, until paid; $575 as the cost of foreclosure title report and appraisal; $310 in unpaid late charges accrued to July 15, 1988, and $5 per month additional

late charges until paid; $1,500 as attorney's fees; and for costs incurred herein, and that writ of execution shall issue therefor.

4. The mortgage executed and delivered by defendant, Robert Roger Fredinburg, to defendant, Marian C. Cooley as assignee of U.S. National Bank of Oregon, dated September 7, 1979, and recorded on September 11, 1979, as document no. 79-19918 in the official records of Jackson County, Oregon, is a valid and subsisting lien for the amount of defendant's, Marian C. Cooley as assignee of U.S. National Bank of Oregon, judgment set forth in paragraph 3 above against the property described in paragraph 2 above, and that lien is superior to any interest, lien or claim of the defendants in that property, except plaintiff.

5. The trust deed lien of plaintiff and the mortgage lien of defendant, Marian C. Cooley as assignee of U.S. National Bank of Oregon, is foreclosed, and all interest which the defendant, Robert Roger Fredinburg, had on and after July 13, 1978, in the real property shall be sold by the Sheriff of Jackson County, Oregon, in the manner provided by law and in accorance with the practices of this Court.

6. The proceeds of sale shall be applied (a) to the costs of sale; (b) then toward the satisfaction of plaintiff's judgment awarded in paragraph 1 above; (c) next toward the satisfaction of defendant's, Marian C. Cooley as assignee of U.S. National Bank of Oregon, judgment awarded in paragraph 3 above; and (d) the surplus, if any, to the Clerk of this Court to be disposed of by further order of this Court.

7. Defendants herein, and each of them, and all persons claiming by, through or under them, whether as purchasers, emcumbrancers, or otherwise, are barred and foreclosed of all right, title, estate, lien, claim or interest of every kind and nature in the real property described above and every portion thereof, including the tenements, hereditaments, appurtenances and fixtures, if any, thereunto belonging or appertaining, excepting only any statutory right of redemption as defendants, or any of them, may have in and to the property.

8. The defendant, United States of America, acting by and through the Federal Deposit Insurance Corporation in its

corporate capacity as successor to Bear Creek Valley Bank, and all persons claiming by, through or under it, as purchasers, encumbrancers, or otherwise, are forever foreclosed of all interest, lien or claim in the real property described above and every portion thereof, excepting only its 365-day statutory right of redemption pursuant to 28 U.S.C., Section 2410(c).

9. Plaintiff, or any other party to this suit, may become a purchaser at the sale of the real property. The purchaser is entitled to exclusive and immediate possession of the real property from and after the date of sale and is entitled to such remedies as are available at law to secure possession, including a writ of assistance if defendant or any other party or person shall refuse to surrender possession to the purchaser immediately upon his demand for possession.

MONEY JUDGMENT

Name of Judgment Creditor:	Marian C. Cooley
Attorney for Judgment Creditor:	Penny L. Austin
Name of Judgment Debtor:	Robert Roger Fredinburg
Attorney for Judgment Debtor:	None

Amount of Judgment	$41,422.80
Costs of Action	$ 314.00
Attorney Fees	$ 3,000.00
Reasonable Expenses	$ 173.00 (title report)
TOTAL	$44,909.80

plus pre- and post-judgment interest to accrue at the rate of 9.75% from 2/2/88 until paid.

MONEY JUDGMENT

Name of Judgment Creditor:	Marian C. Cooley
Attorney for Judgment Creditor:	Penny L. Austin
Name of Judgment Debtor:	Robert Roger Fredinburg
Attorney for Judgment Debtor:	None

Amount of Judgment	$8,012.39
Foreclosure Title Report & Appraisal	$ 575.00
Unpaid Late Charges	$ 310.00 (late charges accrued to 7/15/88 and $5.00 per month additional late

charges until paid)

Costs of Action	Included in first money judgment above
Attorney Fees	$ 1,500.00
TOTAL	$10,397.39

plus pre- and post-judgment interest to accrue at the rate of 12% per annum from 6/15/87 until paid.

ATTORNEY'S CERTIFICATION

I, Penny L. Austin, hereby certify that the above Money Judgment accurately reflects the judgment contained in this Judgment and Decree of Foreclosure.

/S/ PENNY L. AUSTIN
Penny L. Austin, OSB #8145
Of Attorneys for Plaintiff

DATED this 26 day of January, 1990

/S/ L.A. MERRYMAN
CIRCUIT COURT JUDGE

IT IS SO STIPULATED:
CRAIN & AUSTIN
By /S/ PENNY L. AUSTIN
Penny L. Austin, OSB #81145
Of Attorneys for Plaintiff and
Defendant, Marian C. Cooley, as
Assignee of U.S. National Bank
of Oregon

FEDERAL DEPOSIT INSURANCE CORPORATION
By /S/ BRUCE W. REYNOLDS
Bruce W. Reynolds, Esq., CSB #104820
Attorney for Defendant, FDIC

EXHIBIT "A"

Beginning at the 1/2 inch iron pipe from which the initial point of EDMONDS SUBDIVISION, situate in the Northwest quarter of Section 14, Township 39 South, Range 1 East of the Willamette Meridian, in Jackson County, Oregon, bears North 66° 46' 50" East, 877.47 feet; thence South 1° 23' 25" West, 204.84 feet to a 1/2 inch iron pipe; thence South 78° 39' 05" West, 37.86 feet to a 3/4 inch iron pipe; thence South 0° 15' 25" West, 300.47 feet to a 1/2 inch iron pipe; thence South 0° 15' 25" West. 13.0 feet, more or less, to the Northerly right of way line of the Pacific Highway; thence South 56° 15' East, along said highway line, 246.0 feet, more or less, to the East line of the Northwest quarter of the Southwest quarter of said Section 14; thence North, along said East line and the East line of the Southwest quarter of the Northwest quarter of said Section 14 a distance of 720.4 feet, more or less, to a point which is South 450.0 feet from the Northeast corner of the Southeast quarter of the Southwest quarter of the Northwest quarter of said Section 14; thence West, 171.5 feet, more or less, to a point which is North 1° 23' 25" East,from the point of the beginning; thence South 1° 23' 25" West, 59.0 feet, more or less, to the true point of beginning.

EXCEPTING THEREFROM the following, to-wit: Beginning at a 1/2 inch iron pipe from which the initial point of EDMONDS SUBDIVISION, situated in the Southwest quarter of Section 14, Township 39 South, Range 1 East of the Willamette Meridian, Jackson County, Oregon; bears North 66° 46' 50" East, 877.47 feet; thence North 1° 23' 25" East, 59.0 feet to the Northwest corner of that tract described in Document No. 75-13344, recorded October 2, 1975, Jackson County, Oregon, Deed Records; thence East along the North line, 171.5 feet to a point on the West line of EDMONDS SUBDIVISION: thence South along the West line thereof, 300.0 feet; thence West 273.0 feet, more or less, to a point South 0° 15' 20" West from a 3/4 inch iron pipe located on the West line of said tract described in Document No. 75-13344 said Official Records and referenced by Survey No. 4041, dated June 26, 1969, George Burrell, Surveyor and filed with the Jackson County Surveyors Office; thence North 0° 15' 25" East, 20.0 feet, more or less, to said 3/4 inch iron pipe; thence North 78° 39' 05" east, 37.66 feet to an iron pipe; thence North 1° 23' 25" East, 37.66 feet to an iron pipe; thence North 1° 23' 25" East, 204.84 feet to the point of beginning.

Code 5-01 Account #10611717, Map 391E14B, Tax Lot 1001

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF OREGON

MARION C. COOLEY, *Plaintiff,* v. ROBERT ROGER FREDINBURG; *Appellant / Respondent* MARION C. COOLEY, *Assignee* U.S. NATIONAL BANK OF OREGON, *Defendant* L. KEN CASTEEL *Defendant* JOHN C. PRESTON *Defendant* PATRICIA J. PRESTON *Defendant* TIMOTHEAS JOHN HORN *Defendant* NORMALEE D. HORN *Defendant* TISCHHAUSER COOPER & CO. *Defendent* FRIEDA A. KUTTIG *Defendant* FEDERAL DEPOSIT INS. CORP. *Defendant / Respondent* HOGUE INVESTMENT CORP. *Respondent / Petitioner*	ORDER DENYING REVIEW CA A68733 SC S39616

The Court has considered the petition for review and orders that it be denied.

DATE: January 26, 1993.

/S/ WALLACE P. CARSON, JR.
Wallace P. Carson, Jr.
Chief Justice

COPIES TO:

Doug Richmond	Attorney for Appellant/Respondent
Federal Deposit Ins. Corp	Attorney for Defendant/Respondent
James N. Westwood	Attorney for Respondent/Petitioner
David Gilstrap V	Attorney for Respondent/Petitioner

APPENDIX E
28 U.S.C. § 2410

§ 2410. Actions affecting property on which United States has lien

(a) Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter -

(1) to quiet title to,

(2) to foreclose a mortgage or other lien upon,

(3) to partition,

(4) to condemn, or

(5) of interpleader or in the nature of interpleader with respect to, real or personal property on which the United States has or claims a mortgage or other lien.

(b) The complaint or pleading shall set forth with particularity the nature of the interest or lien of the United States. In actions or suits involving liens arising under the internal revenue laws, the complaint or pleading shall include the name and address of the taxpayer whose liability created the lien and, if a notice of the tax lien was filed, the identity of the internal revenue office which filed the notice, and the date and place such notice of lien was filed. In actions in the State courts service upon the United States shall be made by serving the process of the court with a copy of the complaint upon the United States attorney for the district in which the action is brought or upon an assistant United States attorney or clerical employee designated by the United States attorney in writing filed with the clerk of the court in which the action is brought and by sending copies of the process and complaint, by registered mail, or by certified mail, to the Attorney General of the United States at Washington, District of Columbia. In such actions the United States may appear and answer, plead or demur within sixty days after such service or such further time as the court may allow.

(c) A judgment or decree in such action or suit shall have the same effect respecting the discharge of the property from the mortgage or other lien held by the United States as may be provided with respect to such matters by the local law of the place where the court is situated. However, an action to foreclose a mortgage or other lien, naming the United States as a party under this section, must seek judicial sale. A sale to satisfy a lien inferior to one of the United States shall be made subject to and without disturbing the lien of the United States, unless the United States consents that the property may be sold free of its lien and the proceeds divided as the parties may be entitled. Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem, except that with respect to a lien arising under the internal revenue laws the period shall be 120 days or the period allowable for redemption under State law, whichever is longer, and in any case in which, under the provisions of section 505 of the Housing Act of 1950, as amended (12 U.S.C. 1701k), and subsection (d) of section 1820 of title 38 of the United States Code, the right to redeem does not arise, there shall be no right of redemption. In any case where the debt owing the United States is due, the United States may ask, by way of affirmative relief, for the foreclosure of its own lien and where property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of its claim with expenses of sale, as may be directed by the head (or his delegate) of the department or agency of the United States which has charge of the administration of the laws in respect to which the claim of the United States arises.

(d) In any case in which the United States redeems real property under this section or section 7425 of the Internal Revenue Code of 1954 [26 USCS § 7425], the amount to be paid for such property shall be the sum of -

(1) the actual amount paid by the purchaser at such

sale (which, in the case of a purchaser who is the holder of the lien being foreclosed, shall include the amount of the obligation secured by such lien to the extent satisfied by reason of such sale),
(2) interest on the amount paid (as determined under paragraph (1)) at 6 percent per annum from the date of such sale, and
(3) the amount (if any) equal to the excess of (A) the expenses necessarily incurred in connection with such property, over (B) the income from such property plus (to the extent such property is used by the purchaser) a reasonable rental value of such property.

(e) Whenever any person has a lien upon any real or personal property, duly recorded in the jurisdiction in which the property is located, and a junior lien, other than a tax lien, in favor of the United States attaches to such property, such person may make a written request to the officer charged with the administration of the laws in respect of which the lien of the United States arises, to have the same extinguished. If after appropriate investigation, it appears to such officer that the proceeds from the sale of the property would be insufficient to wholly or partly satisfy the lien of the United States, or that the claim of the United States has been satisfied or by lapse of time or otherwise has become unenforcable, such officer shall so report to the Comptroller General who may issue a certificate releasing the property from such lien.

(Nov. 2, 1966, P.L. 89-719, Title II, § 201, 80 Stat. 1147.)

APPENDIX F
OREGON REVISED STATUTE 23.530

23.530 Why may redeem.

Property sold subject to redemption, as provided in ORS 23.520, or any part thereof separately sold, may be redeemed by the following persons:

(1) The mortgagor or judgment debtor whose right and title were sold, or the heir, devisee or grantee of the mortgagor or judgment debtor, who has acquired, by inheritance, devise, deed, sale, or by virtue of any execution or by any other means, the legal title to the whole or any part of the property separately sold; provided, that in the event redemption is made by anyone acquiring the legal title after attachment, or after a judgment becomes a lien on the property, such person shall acquire no greater or better right thereby to the property so redeemed than the holder of the legal title at the time of such attachment or judgment.

(2) A creditor having alien by judgment, decree or mortgage on any portion of the property, or any portion of any part thereof separately sold, subsequent in time to that on which the property was sold. Such creditors, after having redeemed the property, are to be termed redemptioners.

(Oregon Revised Statutes 1989)

92-1758

No. 92-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

HOGUE INVESTMENT CORPORATION,
an Oregon Corporation
Petitioner,

v.

ROBERT ROGER FREDINBURG
Respondent.

Petition for a Writ of Certiorari
To The Court of Appeals
For the State of Oregon

Respondent's Brief in Opposition

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QUESTION PRESENTED

1. Whether the redemption right provided to the United States under 28 U.S.C. §2410(c), for those instances where a judicial sale is given effect under state law, applies where state law does not recognize the existence of any judicial sale because of the redemption of the judgment debtor.

2. Whether the United States as the holder of an inferior lien in real estate judicially foreclosed under 28 U.S.C. §2410 can ignore state law and procedures, which amply allow it to protect its interest, in the exercise the right of redemption provided by 28 U.S.C. §2401(c).

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NO. 92-

HOGUE INVESTMENT CORPORATION,
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V.

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Respondent.

Respondent's Brief in Opposition To The Petition For a Writ of Certiorari To The Court of Appeals For The State of Oregon

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Respondent Robert Roger Fredinburg ("Fredinburg") submits that the writ of certiorari requested by Petitioner Hogue Investment Corporation ("Hogue") must be denied.

STATUTES INVOLVED

In addition to those statutes set forth by Hogue, Fredinburg directs the Court's attention to Oregon Revised Statutes ("O.R.S.") §23.540 through §23.600, set forth in the Appendix.

STATEMENT OF THE CASE

Hogue misstates the decision of the Oregon court of Appeals in several significant respects, thereby exaggerating its effect and importance.

First, the Court of Appeals for Oregon did not strike down the federal right of redemption granted to the United States in 28 U.S.C. §2410(c). The court simply held that the United States, pursuant to the first sentence of 28 U.S.C. §2410(c), was bound by Oregon law in exercising its right of redemption. *Appendix A of Petition* at 5a. It specifically held that under law no judicial sale was recognized and that the United States

did not take the proper yet available steps to protect its interest. *Id.* at 3a, 5a. Thus, the one-year redemption right under 28 U.S.C. §2410(c) did not apply.

Secondly, the court below did not hold that the existence of O.R.S. §23.530 defeated preemption. In fact, the court held that this statute allowed the United States to adequately protect its interests. *Id.* at 6a. "The problem here is that FDIC did nothing, even though under Oregon law it could have taken the steps necessary to permit it to exercise its right to redeem or to collect on its judgment lien". *Id.* at 5a. Thus, Hogue erroneously suggests a direct conflict between Oregon and federal law that is not present.

Third, for the same reasons, Hogue's suggestion that the FDIC "redeemed the property in strict compliance with all state procedural requirements" is equally misleading. *Petition* at 2.

Lastly, Fredinburg did not contend on appeal below that Oregon law superseded 28 U.S.C. §2410(c). Rather it was argued that since he redeemed as the judgment debtor, under Oregon law Fredinburg was restored to the estate "as if no sale had been attempted". *Kaston v. Storey,* 47 Or. 150, 153, 80 P. 217 (1905). *Franklin v. Spencer,* 309 Or. 476, 4897, 789 P.2d 643 (1990).

REASONS FOR DENYING THE PETITION

I. BASING ITS DECISION UPON THE APPLICATION OF NON-CONFLICTING STATE LAW AS EXPRESSLY REQUIRED BY 28 U.S.C. §2410(c) ITSELF, THE OREGON COURT OF APPEALS DECIDED NO IMPORTANT FEDERAL QUESTION.

In its decision, the court below recognized the doctrine of preemption and its potential application in Oregon foreclosure proceedings. *Appendix A of Petition at 3a.* However, on the facts before it the court correctly decided that preemption did not apply.

In 28 U.S.C. §2410(c), Congress has expressly made the one year redemption period subject to state law regarding the effect of judgment or decree. The first sentence of 28 U.S.C.

§2410(c) provides:

> A judgement or decree in such action or suit shall have the same effect respecting the discharge of the property from the mortgage or any other lien held by the United States as may be provided with respect to such matters by the local law of the place where the court is situated.

28 U.S.C. §2410(c). The clear import of this first sentence is the state law shall determine whether a "sale" has occurred. Thus, this Court expressly has already found no "federally imposed requirement that there *be any judicial sale at all*" under this provision. *United States v. Brosnan*, 363, U.S. 237, 245, 80 S.Ct. 1108, 4 L.Ed.2d 1192 (1960) (emphasis added) ("nothing in that section indicates when a judicial sale is to be had.").

Under Oregon law, one of the effects of the judgment is allowing the judgment debtor to redeem and avoid the judicial sale. O.R.S. §23.600, *See Appendix at 5a*. Upon this redemption, "the effect of the sale shall terminate" and the judgment debtor is restored to the estate. *Id.* Once this occurs, Oregon law deems that the judicial sale has never occurred. *Franklin v. Spencer*, 309 Or. 476, 487, 789 P.2d 643 (1990); *Kaston v. Storey*, 47 Or. 150, 153, 80 P. 217 (1905). There has been no sale in the instant case and, therefore, the one year redemption period of 28 U.S.C. §2410(c) never came into effect.

Furthermore, the United States is not relived by 28 U.S.C. §2410(c) of state law procedures for protecting its interest or preserving the redemption right. Regardless of whether a judicial sale occurs, Congress has allowed the United States to protect itself by taking such steps as state law may require.

> ***In *any case* where the debt owing the United States is due, the United States may ask, by way of affirmative relief for the foreclosure of its own lien***.

28 U.S.C. §2410(c) (emphasis added). Where the United States has "satisfied the procedural requirements" of state law, this Court has upheld its interest under this statute. *U.S. v. John Hancock Mut. L. Ins. Co.*, 364 U.S. 301, 304, 81 S.Ct. 1, 5 L.Ed.2d 1 (1960).

In the instant case, however, the FDIC did nothing, except stipulate to a recital in the judgment and decree of foreclosure that they had a 365-day right of redemption. Under Oregon law, this method is insufficient to protect the right of redemption.

The practical effect of this failure and the redemption by Fredinburg was to extinguish the lien of the United States without a judicial sale. Since 28 U.S.C. §2410 is not the only way in which a federal lien can be extinguished, nothing improper occurred. This provision does not exclude other available state procedures. *Brosnan*, 363 U.S. at 246 (1960). Thus, like the interest of a potential lien creditor having a 60-day redemption right, it can have its interest extinguished if no sale occurs. *See i.e.* O.R.S. §23.540, *Appendix* at 1a. Consequently if the effect of Oregon law is to extinguish the lien of the United States without a judicial sale, that is certainly allowed for. There being no judicial sale, no right of redemption for the United States arose.

II. THE STATE COURT'S DECISION IS NEITHER IN CONFLICT WITH THE DECISIONS OF THIS COURT NOR ANY OF THE SEVERAL FEDERAL CIRCUIT COURTS.

No conflict in case law exists that would compel this Court's review. In that no judicial sale occurred, the court's decision below is similar to *Brosnan* and is consistent therewith. *Brosnan*, 363 U.S. at 245. Furthermore, *John Hancock Mutual L. Ins. Co.* is distinguishable in at least two respects: 1) the Kansas law expressly *excluded* all redemption rights for anyone other than the judgment debtor for one year; and 2) the United States diligently acted to protect its interest under Kansas law. *Appendix A of Petition* at 5a.

Similarly, the court below could not itself and did not create any conflict between the federal circuits. Hogue's petition admits that the Ninth Circuit in *Dupnik v. United States*, 848 F.2d 1476 (9th Cir. 1988) held against preemption in favor of a state notice procedure. *Petition* at 9. it further concedes that the Tenth Circuit's decision in *Title Ins. Co. of Minnesota v. I.R.S. of U.S.*, 963 F.2d 297 (10th Cir. 1992) turned upon preemption by a tax regulation not at issue in this case. *Id.* Lastly, the *United States v. Warford*, 791 F.2d 1519 (11th Cir. 1986), decision and the *United States v. Sizemore*, 747 F.2d 470 (9th Cir. 1984) decision are both distinguishable. Each turned on the effect under Florida and Arkansas law, respectively, of certain language in foreclosure decrees. *Id.* at 9-10. As

discussed at length herein, under Oregon law once the judgment debtor redeems no judicial sale exists regardless of reservations contained in the decree. *Infra* at 4-5.

III. THE STATE COURT'S DECISION IN CONSISTENT WITH THE CONGRESSIONAL PURPOSE BEHIND 28 U.S.C. §2410.

The Court of Appeals for Oregon recognized the importance of the congressional purpose behind 28 U.S.C. §2410(c) in protecting inferior liens of the United States. *Appendix A of Petition*, at 5a. Yet if found that if the United States had simply satisfied the requirements of Oregon law, that congressional purpose would have been more than satisfied. *Id.* at 6a. This case did not then involve the situation for which the statute was enacted, namely the United States having its lien dissolved *"without having had a chance to protect its right . . ." John Hancock Mut. L. Ins. Co.*, 364 U.S. at 305 (emphasis added).

IV. THE ISSUE RAISED IN THIS CASE TURNS UPON THE LIMITED SCOPE OF FACTS AND IT WILL AFFECT FEW OTHERS.

It should be emphasized that the FDIC, the party who attempted to redeem from the debtor, has chosen not to join in this petition. This signifies the *de minimis* effect of the Oregon Court of Appeals decision upon the rights of the federal government. Any federal agency, finding itself in the same position as the FDIC in this case, need only follow minimal procedures provided by Oregon law.

It is extremely likely in such a case that the very fact of the foreclosure will make the debt due to United States. Therefore, the United States will be able to foreclose its lien and protect its redemption rights under Oregon law. There will be little expense involved in such a procedure. It is reasonable to conclude that any interest of the United States of any significance would be protected. Neither Oregon foreclosure law nor the decision of the Oregon Court of Appeals raises any notable impediment.

CONCLUSION

For the reasons set forth herein, the Petition for a Writ of Certiorari must be denied.

May 1993

Respectfully Submitted

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APPENDIX
OREGON REVISED STATUTES

23.540 Redemption by lien creditor. A lien creditor may redeem the property within 60 days from the date of the sale by paying the amount of the purchase money, with interest at the rate of 10 percent per annum thereon from the time of sale, together with the amount of any taxes which the purchaser may have paid thereon, and any other sum which the judgment debtor might be required to pay for redemption, with like interest, and if the purchaser is also a creditor having a lien prior to that of the redemptioner, the amount of such lien, with interest; provided, that if objections to any sale are filed, a lien creditor may redeem within 60 days from the date of the order confirming the sale.

23.550 Redemption from redemptioner. If the property is redeemed under ORS 23.540, any other lien creditor may, within 60 days from the last redemption, again redeem it, on paying the sum paid on the last redemption, with interest at the rate of 10 percent per annum thereon from the date of the last preceding redemption in addition, together with any taxes which the last redemptioner may have paid thereon, and, unless the lien of the lien creditor is prior to that of such redemptioner, the amount of such lien, with interest. The property may be again, and as often as any lien creditor or redemptioner is disposed, redeemed from the last previous redemptioner, within 60 days from the date of the last redemption, on paying the sum paid on the last previous redemption, with interest at the rate of 10 percent per annum, thereon, from the date of such previous redemption, together with the amount of any taxes paid thereon by such last redemptioner, and the amount of any liens held by such last redemptioner prior to the redemptioner's own, with interest.

23.560 Redemption by mortgagor, judgment debtor or successors; lien of purchaser. (1) The mortgagor or judgment debtor whose right and title were sold, or the heir, devisee or grantee of the mortgagor or judgment debtor, who has acquired by inheritance, devise, deed sale, or by virtue of

any execution or by any other means, the legal title to the property sold, may, at any time within 180 days after the date of sale, redeem the property; provided that a transfer of the judgment debtor's interest in the property, either before or after sale, shall preclude the judgment debtor from the right to redeem unless the proceeds from the sale are insufficient to satisfy the judgment, in which event the judgment debtor shall have the right to redeem at any time within 10 days after the 180 days herein allowed for redemption, and not otherwise.

(2) Redemption shall be made by paying the amount of the purchase money, with interest thereon at the rate of nine percent per annum from the date of sale, together with the amount of any taxes the purchaser may have been required to pay thereon, and any sums necessarily expended by the purchaser to prevent waste, and also all sums that the purchaser may have been required to pay on prior liens, with interest upon every such payment made by the purchaser at the rate of nine percent per annum from the date of payment thereof; subject to the set-off provided for in subsection (3) of this section.

(3) The mortgagor or judgment debtor, the heir, devisee or grantee of the mortgagor or judgment debtor shall be entitled to a set-off, against the amount necessary to be paid to redeem any property subject to redemption, for all rents, issues and profits accruing from the property sought to be redeemed while the same was in the possession of the purchaser, upon the mortgagor or judgment debtor giving to the purchaser or the purchaser's successors in interest at least 10 days' written notice to render an accounting for all rents, issues and profits accruing from the property sought to be redeemed. If the property sold is farmland, the purchaser shall have a lien on the first crops sown or grown thereon after the sale, for all sums reasonably expended by the purchaser in plowing, cultivating or seeding the premises in the usual husbandlike manner, which lien shall be superior to all other liens except the liens of laborers for work in cultivating said lands or harvesting the crops grown thereon, as now provided by law. If the premises are other than farmlands, the purchaser shall have alien on the profits thereof arising during the period of

redemption for sums necessarily expended by the purchaser to prevent waste.

(4) Within 10 days after the notice provided for in subsection (3) of this section is given, the purchaser or the purchaser's successors in interest shall file with the sheriff of the county wherein the property sought to be redeemed is situated a verified account of all rents, issues and profits accruing from, and of all sums for which the purchaser claims a lien upon the property sought to be redeemed while the same was in the possession of the purchaser or the purchaser's successors in interest. At any time within five days thereafter the judgment debtor or mortgagor shall file any objection which the judgment debtor or mortgagor may have to said account with the sheriff, who forthwith shall transmit all papers in the sheriff's possession touching upon said foreclosure, sale and redemption to the circuit court having jurisdiction, or to the judge thereof. The sums, if any, due the mortgagor or judgment debtor, or claimed by the purchaser under the purchaser's lien, shall thereafter be determined by the circuit court or the judge thereof at chambers in a summary manner at the time of redemption, and, upon such determination, the judge shall immediately return the files in the case, together with the judge's findings, to the sheriff of such county. Either party may appeal to the Court of Appeals from such determination and decision by the circuit court. An appeal by the redemptioner shall not extend the time for redemption unless the redemptioner shall, in addition to the undertaking otherwise required by law upon appeal, and within the time allowed for filing an undertaking upon appeal, give an undertaking with one or more sureties, who shall justify in like manner as bail upon arrest, that the redemptioner will fully consummate the redemption and pay such sums as shall finally be determined to be the amounts required for the redemption.

(5) As used in this section, "purchaser" or "purchaser or the purchaser's successors in interest" means the original purchaser or the original purchaser's assigns, or the purchaser's successors in interest or those holding after the purchaser or under the purchaser.

23.570 Mode of redeeming. The mode of redeeming shall be as provided in this section:

(1) The person seeking to redeem shall give the purchaser or redemptioner not less than two days' nor more than 30 days' notice of an intention to apply to the sheriff for that purpose; if with reasonable diligence personal service of such notice cannot be made within the state, then proof thereof by affidavit filed with the sheriff shall be equivalent to such personal service. At the time and place specified in the notice, which place shall be the office of the sheriff at the courthouse, such person may redeem by paying to the sheriff the sum required. The sheriff shall give the person redeeming a certificate, as in the case of sale on execution, adding therein the sum paid on redemption, from whom redeemed, and the date thereof. The redemptioner shall file the certificate of redemption with the clerk of the court out of which execution issued. The clerk shall note the filing of the certificate of redemption in the court register and shall place the certificate in the case file.

(2) A party seeking to redeem shall submit to the sheriff the evidence of the right thereto as follows:

(a) Proof that the notice required by this section was given to the purchaser or redemptioner or waived.

(b) If the party is a lien creditor, a copy of the docket of the judgment or decree under which the party claims the right to redeem, certified to by the clerk of the court where such judgment or decree is docketed, or if the party seeks to redeem upon a mortgage, the certificate of the record thereof.

(c) A copy of the assignment necessary to establish the claim, verified by the affidavit of the party or agent; an affidavit by the party or agent showing the amount then actually due on the judgment, decree or mortgage.

(3) If the redemptioner or purchaser has a lien prior to that of the lien creditor seeking to redeem, such redemptioner or purchaser shall submit to the sheriff the like evidence thereof and of the amount due thereon, or the same may be disregarded.

(4) When two or more persons apply to the sheriff to redeem at the same time, the sheriff shall allow the person having the prior lien to redeem first, and so on. The sheriff shall immediately pay the money over to the person from whom the property is redeemed, if the person attends at the redemption; or if not, at any time thereafter when demanded. When a sheriff wrongfully refuses to allow any person to redeem, the right of the person thereto shall not be prejudiced thereby, and upon submission of the evidence and the tender of the money to the sheriff as provided in this section the sheriff may be required by order of the court or judge thereof to allow such redemption.

23.580 Court may restrain waste; what use permitted. Until the expiration of the time allows for redemption, the court, or judge thereof, may restrain the commission of waste on the property by order granted with or without notice, on the application of the purchaser or judgment creditor; but it shall not be deemed waste for the person in possession of the property at the time of sale, or entitled to possession afterwards, during the period allowed for redemption, to continue to use it in the same manner in which it was previously used; or to use it in the ordinary course of husbandry; or to make the necessary repairs to buildings thereon; or to use wood or timber on the property for the repair of fences or for fuel for the family of the person in possession of the property while the person occupies the property.

23.590 Possession after sale; right to rents or value of use. The purchaser from the day of sale until a resale or a redemption, and a redemptioner from the day of redemption until another redemption, shall be entitled to the possession of the property purchased or redeemed, unless the same is in the possession of a tenant holding under an unexpired lease, and in such case, shall be entitled to receive from such tenant the rents or the value of the use and occupation thereof during the same period.

23.600 Conveyance to purchaser or redemptioner; effect of redemption by judgment debtor. If redemption is

not made as prescribed in ORS 23.520 to 23.590, or when redemption is made and a period of 60 days has elapsed without any other redemption, the purchaser or redemptioner shall be entitled to a conveyance from the sheriff. If the judgment debtor redeems at any time before the time for redemption expires, the effect of the sale shall terminate and the judgment debtor. if, at any time prior to the expiration of the statutory period of redemption, it is made to appear to the satisfaction of the court, that the purchaser or redemptioner has acquired the rights of all persons entitled to redeem, the court may direct the sheriff to execute a deed of conveyance to such purchaser of redemptioner forthwith, and upon the execution thereof the title of such purchaser or redemptioner shall become absolute.